

Table 2 also shows that the Commission's EEO program has already succeeded in achieving full gender integration in an important job category, Salespersons. Thus, it would be appropriate for the Commission to develop an indicator of women's attainment of senior positions in sales management -- positions which have the greatest job networking potential. When women are fully integrated at all levels in the Salespersons category, they will possess the networking ability which already permits women in the Office and Clerical category to replenish their numbers even in the absence of affirmative action requirements. When that happens, affirmative action efforts aimed at women in the Salespersons category can be focused elsewhere -- because they will have succeeded.

Women are also well on their way toward achieving parity in television professional employment. That is also true for minority technicians in both radio and television -- a remarkable achievement considering the fact that there were virtually no minorities in broadcast engineering just a generation ago. However, it appears that women are grossly underrepresented as technicians, particularly in radio, and they are seriously underrepresented as professionals in radio.

Minorities continue to be very poorly represented as officials and managers and salespeople in both television and radio.<sup>53/</sup> In our experience, the low representation of minorities in sales

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<sup>53/</sup> These are precisely the job categories most essential to one's eventual movement from employment to entrepreneurship -- further underscoring the need for minorities to develop much more rapidly in these critical job categories. See pp. 313-320 infra.

positions derives from several impermissible factors, including (1) many stations' open (or covert), conscious (or subconscious) assumption that minorities can't sell their format; (2) the perception of some broadcasters that a significant number of time buyers prefer to deal with White account executives; (3) the failure of many broadcasters to include sales training in their in-house training and internship programs; (4) the hesitancy of some broadcasters to consider, for sales employment, minorities with solid sales experience in other fields (e.g. automotive, retail and real estate); (5) the country-club atmosphere of the broadcast sales business, which injects into the sales environment prejudices embedded in other areas of American commerce; and (6) the inherent "networking" nature of sales, which inevitably translates itself into word of mouth job recruitment.

Indeed, minority entry into broadcast sales, and female entry into broadcast engineering, may well be the most critical immediate need for FCC EEO scrutiny.

In headquarters employment, minorities and women appear to be somewhat less well represented than they are in station employment.<sup>54/</sup> There are probably three reasons for this. First, headquarters staffs often include longer tenured individuals,

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<sup>54/</sup> The only exception seems to be the representation of women in the top four categories in headquarters staffs, which exceeds their representation at the station level. That anomaly in the data appears attributable to the fact that headquarters staffs, especially in television, employ relatively far fewer technicians than do station staffs. Women are severely underrepresented among technicians at the station level, pulling down their overall representation in the top four categories at the station level. Consequently, women are actually better proportionally represented in headquarters staffs in the top four categories than they are at the station level.

including those recruited from the company's owned stations. Second, headquarters staffs may have wider responsibilities, and thus may require more training and expertise than do line employees. Third, unlike station employees, headquarters employees are not subject to the EEO Rule, which provides an important incentive for employers to recruit and hire minorities and women aggressively for station positions. The low representation of minorities and women in headquarters employment is especially troubling because growing consolidation of stations into superduopolies will inevitably result in a significant shift of employees away from stations into headquarters staffs. Consequently, it would be appropriate for the Commission to begin to examine headquarters EEO data and to require the filing of headquarters EEO programs in connection with renewal applications.

The percentage of workforce parity in minority and female employment attained nationally, and the rate at which the representation of minorities and women has changed, are good indications of the success of the Commission's EEO program.<sup>55/</sup> Table 3 sets out the percentages of parity attained by minorities

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<sup>55/</sup> We emphasize that industrywide attainment of workforce parity is a good indicator of the cumulative success of a national EEO initiative. See Nondiscrimination - 1969, 18 FCC2d at 243. Because it aggregates the EEO performance of thousands of stations, the vicissitudes of market conditions in any one city, or management policies unrelated to EEO at any one company will not materially affect national statistics. However, any individual station's attainment of workforce parity for minorities and women is but one valuable piece of evidence -- among many pieces of evidence -- of that station's EEO compliance. See pp. 222-228 infra.

and women, in several categories of broadcast employment, in 1991 and in 1995.<sup>56/</sup>

**TABLE 3**  
**PERCENTAGES OF PARITY ATTAINED BY MINORITIES AND WOMEN**  
**IN POTENTIALLY REGULATED CATEGORIES (1991 and 1995)**

<u>Job Category</u>	<u>Protected Group</u>	<u>Year</u>	<u>Radio</u>	<u>Television</u>	<u>Radio and Television</u>	<u>Head-quarters</u>
Officials/Managers	Minorities	1991	56.0	54.5	55.3	58.6
	Minorities	1995	55.6	59.1	57.2	49.8
	Women	1991	72.2	73.3	72.6	61.4
	Women	1995	74.3	80.0	76.7	63.8
Top Four Categories	Minorities	1991	63.1	79.1	71.6	90.5
	Minorities	1995	63.8	78.6	72.6	64.1
	Women	1991	71.7	68.0	69.5	74.0
	Women	1995	74.5	71.5	72.7	74.7

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<sup>56/</sup> The categories we selected are Officials and Managers and the top four job categories. Officials and Managers is the key job category for decisionmaking, networking to replenish the representation of members of one's group, and preparation for entrepreneurship. See pp. 313-320 *infra*. The top four categories are already measured for "zone of reasonableness" analysis, as is total fulltime employment. See pp. 283-289 *infra*. However, as we have noted, the bottom five EEO categories are no longer relevant for affirmative action analysis. *Id.* Thus, no data is given here for total fulltime employment.

We selected the year 1991 as our baseline because it is the year farthest back in time for which the state of market conditions and federal civil rights protections can be said to have been essentially the same as they were in 1995. During this period, "superduopolies" had not yet been created, see pp. 65-68 *infra*, and the employment shakeout derived from the 1987-1989 business failures of the late-1986 wave of speculative, tax-driven broadcast transactions had concluded. Furthermore, the adverse effects on minorities and women of the Ward's Cove Parking Co. v. Atonio, 490 U.S. 642 (1989) ("Ward's Cove") had already been felt in the national workplace, and the Commission's efforts-based 1987 EEO policies had already been implemented in both television and radio during a license renewal period; see Equal Employment Opportunity in the Broadcast Radio and Television Services, 2 FCC Rcd 3967 (1987) ("Broadcast EEO - 1987").

We believe the Commission should set a target -- the year 2009 -- to preside over the elimination of discrimination and its present effects. See pp. 30-34 supra. Since talent is equally distributed by race and sex, national workforce parity should obtain when discrimination and its present effects are eliminated. Thus, the attainment of workforce parity (along with other evidence, such as the presence of minorities and women in senior management positions with networking capability) is sound evidence that discrimination and its present effects have been eliminated.<sup>57/</sup>

The rate at which protected group employment has grown between 1991 and 1995 (see p. 42, Table 3 supra) yields a very useful number: the year by which, at that rate of growth, parity will ultimately be attained. We have calculated these years for parity achievement and have set them out in Table 4.

**TABLE 4**

**YEAR BY WHICH PARITY WILL BE ATTAINED BY  
MINORITIES AND WOMEN IN POTENTIALLY REGULATED  
CATEGORIES, GIVEN THE CHANGE IN MINORITY AND  
FEMALE REPRESENTATION BETWEEN 1991 AND 1995**

<u>Job Category</u>	<u>Protected Group</u>	<u>Radio</u>	<u>Television</u>	<u>Radio and Television</u>	<u>Head- quarters</u>
Officials/Managers	Minorities	Never	2036	2090	Never
	Women	2046	2008	2019	2057
Top Four Categories	Minorities	2207	Never	2110	Never
	Women	2032	2029	2030	2141

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<sup>57/</sup> For a handful of positions (e.g. technicians), the lack of specialized educational opportunities may also be a critical factor in depriving minorities and women of equal opportunity. However, the educational opportunities will present themselves once the job opportunities are there. Before a university creates a vocational program, it must first be assured that its graduates will have jobs awaiting them. See Declaration of Dr. James Hawkins, Exhibit 8 hereto.

The data in Table 4 is quite disturbing, for it appears that in many categories of employment, the rate of change in minority or female representation is often so slow that parity could not be achieved by the year 2009 and, indeed, may not be achieved in our lifetimes. Specifically:

- We are on target to reach parity for minorities in broadcast station management by 2090, the 150th anniversary of the date on which the FCC issued its first First Class Radiotelephone License to a Black man.
- We are on target to reach parity for minorities in the top four categories in broadcast stations by the year 2110 -- one year too late to miss the 200th anniversary of broadcasting.
- We are on target to reach parity for women in broadcast station management by the year 2019 -- one year short of the 100th anniversary of the 19th Amendment.
- We would reach parity for women in the top four categories of broadcast stations by 2030, the 50th anniversary of the year the Equal Rights Amendment died.
- Minority representation in radio station management, in the top four categories of television station employment, and in both management and the top four categories of broadcast headquarters employment is declining. Unless these trends in minority representation are reversed, we will never reach parity for minorities in these categories.

From this data, we must conclude that a significant increase in the strength of FCC EEO enforcement will be required in order to enable minorities and women to reach national workforce parity by 2009, or indeed within the lifetimes of most of us.

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**B. EEO Programs And EEO Performance  
At Tennessee Radio Stations**

MMTC's study, "EEO Programs and EEO Performance at Tennessee Radio Stations", is Exhibit 1 of these Comments. It is the first major empirical review of broadcasters' EEO performance. MMTC undertook the study to determine which types of broadcasters operate more sophisticated EEO programs, which types of broadcasters operate more successful EEO programs, and whether particular EEO compliance techniques tend to be more likely than others to yield successful EEO results. The study's conclusions are summarized below.

The research questions answered by the study were:

1. What are the characteristics of the stations and markets (the "station or market attributes") for a sample of radio stations? 58/
2. What proportion of stations engages in each of a number of activities designed to promote the recruitment and retention of minorities and women (the "EEO program attributes")? 59/
3. What proportion of stations has achieved various measurable levels of success in recruiting, hiring and retaining minority employees (the "EEO success attributes")? 60/

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58/ EEO station or market attributes include market size, the number and percentage of minorities in the market, the number of persons hired and employed, and the staff turnover rate.

59/ EEO program attributes include the number of sources used for job recruitment, the number of those sources which produced job candidates, the operation of a training or internship program, and the station's participation in job fairs.

60/ EEO success attributes include the number of minorities referred for employment, hired, and reported as employees; the proportion of minority candidates in the applicant pool relative to minorities' representation in the population; the proportion of minority employees relative to minorities' representation in the population.

4. What correlations exist between pairs of variables which each measures a station or market-specific attribute?
5. What correlations exist between pairs of variables which each measures an EEO program attribute?
6. What correlations exist between pairs of variables which each measures an EEO success attribute?
7. What types of stations (see n. 58) operate the most thorough EEO programs (see n. 59)?
8. What types of stations (see n. 58) operate the most successful EEO programs (see n. 60)?
9. What types of activities manifesting the thoroughness of an EEO program (see n. 59) tend to correlate with the most successful EEO programs (see n. 60)?

Thirty-three variables, reflecting market, station, and EEO data, were analyzed for the 210 radio stations in the state of Tennessee which filed 1996 license renewal applications.<sup>61/</sup> The standard measures of central tendency (mean, median, mode) and variability (standard error, standard deviation, skewness and

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<sup>61/</sup> MMTC defined a "station" as an AM radio station unaffiliated with another radio station in its market (an "AM standalone"), an FM radio station unaffiliated with another radio station in its market ("an "FM standalone") or an AM-FM combination.

Tennessee stations are among those for which current EEO program data (from FCC Form 396) were immediately available from the FCC. Tennessee was selected as the state to be analyzed because it is geographically and demographically representative of the United States. It is a "border state" with large and small, rural and urban markets, and a sizeable minority population which approximates that of the United States. Tennessee is not known as a state whose broadcasters, as a group, have either generally resisted the FCC's EEO compliance efforts or taken the lead in complying with them.

MMTC's source for market size and demographic data was the 1990 Census. MMTC's source for the number of station employees, categorized by race and job category, was each station's 1995 FCC Form 395 (the most recent data available), giving data for a two week period between January and March of 1995. MMTC's source for EEO program data was each station's 1996 FCC Form 396, which covers the period March, 1995 through March, 1996.

kurtosis) were computed for each variable, and a correlation coefficient (r) was measured for each pair of variables.

The study reached these major conclusions:

1. Proposals to deregulate EEO compliance for "small" stations would exempt 45% of the currently non-exempt Tennessee stations if the size cutoff were ten fulltime employees, 58% of the currently non-exempt Tennessee stations if the size cutoff were fifteen fulltime employees and 70% of the currently non-exempt Tennessee stations if the size cutoff were twenty fulltime employees. If the Commission evaluated staff size based on the number of top four category employees rather than the number of fulltime employees, a ten employee cutoff would exempt 47% of the currently non-exempt Tennessee stations, a fifteen employee cutoff would exempt 62% of the currently non-exempt Tennessee stations, and a twenty employee cutoff would exempt 70% of the currently non-exempt Tennessee stations.

2. Proposals to deregulate EEO compliance for "small market stations" would exempt 7.6% of the currently non-exempt Tennessee stations if the market size floor were 20,000, 12.9% of the currently non-exempt Tennessee stations if the market size floor were 25,000, 37.6% of the currently non-exempt Tennessee stations if the market size floor were 50,000, and 44.8% of the currently non-exempt Tennessee stations if the market size floor were 100,000.

3. Proposals to deregulate EEO compliance for stations in markets with "small minority populations" must be evaluated by first recognizing that 33.0% of Tennessee stations are not required to have an EEO program for minorities, inasmuch as they are situated in markets with less than 5% minority population. If

minority population percentage were used to trigger an EEO compliance exemption, and the minority population percentage floor were set at 10%, 56% of Tennessee's stations would be exempt. If the minority population percentage floor were set at 20%, 88% of Tennessee's stations would be exempt.

4. The majority of stations are essentially exempt from detailed EEO review now, owing to nothing more than the presence of a low turnover rate in the reporting year. Fifty-eight percent of the stations reported three or fewer top four category hires during the reporting year, and 34% reported three or fewer fulltime hires during the reporting year. Virtually no stations whose Form 396 EEO programs reported three or fewer hires have ever been the subject of a Bilingual investigation, irrespective of how many persons had been hired in earlier years or how many persons are likely to be hired in subsequent years.

5. If the Commission shifts its enforcement emphasis from fulltime jobs to top four category jobs, it will need to expand the reporting period (e.g. from one year to four years) in order to obtain the same volume of hiring data on top four category employment which it now obtains for fulltime employment. This follows from our observations of job turnover rates, which showed that turnover was far more commonplace in the bottom five categories than in the top four categories. While 32% of the stations filing Form 396 reported no top four category hires during the reporting year, only 8% reported no fulltime hires during the reporting year. The median number of top four category hires was three. However, the median number of fulltime hires was six, even though the vast majority of all employees work in the top four categories, as shown by the fact that the median number of top four

category employees was eleven and the median number of fulltime employees was twelve. The majority of the stations' top four category job turnover rates were rather low, with 62% of the stations turning over less than 25% of the number of employees they reported in the top four categories, although 38% of the stations turned over less than 25% of the number of fulltime employees they reported. The median percentage of top four category staff which turned over was 9% and the median percentage of fulltime staff which turned over was 33%.

6. A good many stations are escaping Commission scrutiny for obvious potential EEO violations. Six percent of stations reported the use of no referral sources at all and 24% reported no sources which produced minority referrals. Moreover, the median number of productive minority sources was only two. However, 11% of the stations reported five or more productive sources of minority referrals, and 25% of the stations reported five or more productive sources of female referrals. Thus, a handful of stations may well be EEO "superperformers", while the majority of the stations operated EEO programs which were of only marginal effectiveness. This conclusion is also supported by evidence that eleven of the fifteen potential pairs of the six EEO program attributes revealed a statistically significant correlation. Stations which used a large number of referral sources tended to have more productive sources for minorities; those with productive sources for minorities tended to have productive sources for women; those with large numbers of referral sources also tended to offer training or internships and to participate in job fairs; and those offering training and internships were more likely to participate in job fairs.

7. Only 27% of the stations reported offering training or internships, and only 12% of the stations reported participation in a job fair. These low numbers for participation in optional, but obviously useful EEO initiatives suggest that an EEO regime premised on "self-regulation" would be a failure.

8. A surprisingly high proportion of the stations which reported minority referral data (25%) reported not one minority referral in the entire reporting year. With the median number of minority referrals being four in a year, it is apparent that the majority of the stations should be doing much more to encourage minorities to apply for employment. This conclusion is underscored by the fact that minorities comprised less than 5% of the applicant pool at 30% of the stations, and less than 10% of the applicant pool at 41% of the stations. Furthermore, 27% of the stations had not attained 50% of parity with the workforce in the composition of their applicant pools, even though the pools included applicants for secretaries and janitors.

9. Ten percent of the stations reported no female referrals in the reporting year, and sixteen percent received three or fewer female referrals. Thus, a good many stations should be doing much more to encourage women to apply for employment.

10. The fact that five stations each generated more than fifty minority applicants demonstrates that minority applicants are in plentiful supply. Apparently, minorities are attracted to the stations which have built a reputation for employing them. Similarly, the fact that twelve stations each generated more than fifty female applicants demonstrates that female applicants are in plentiful supply. The fact that the same pattern of high recruitment numbers for a handful of stations obtained for women as

obtained for minorities demonstrates that the high number of minority applicants at a handful of stations cannot be attributed to format considerations alone.

11. The measures of percentage of parity attained for minority employment shows that substantial progress is yet to be made for top four category positions. While the median minority fulltime employment percentage of parity was 64%, the median minority top four category percentage of parity was only 46%. This means that approximately half of the radio stations in Tennessee have failed even the FCC's lenient "zone of reasonableness" test used to determine whether thorough review of their EEO programs is needed to exclude the possibility that their stations might be discriminating.

12. Turnover rate for fulltime employees was negatively correlated with fulltime staff size. This finding demonstrates that larger stations tended to retain employees relatively longer than do smaller stations. On the one hand, this means that statistical review of smaller stations' EEO performance may be had by reviewing minority and female hiring over a period of years. On the other hand, this finding lends credence to some broadcasters' contention that smaller stations (perhaps because of lower pay or less competent management) do not retain employees for as long a time as larger stations. This finding also lends credence to civil rights organizations' contention that smaller stations are a point of entry from which newcomers to the industry advance to larger stations as they develop their careers.

13. The finding that the minority proportion of referrals was correlated with minority employment percentage of parity -- but the raw number of minority referrals was not correlated with

minority employment percentage of parity -- underscores the importance of attracting an applicant pool which is representative of the population. Minorities must not only be present in the applicant pool, they must be more than tokens who are numerically overwhelmed by other applicants.

14. The finding that no station or market attribute (including market size and demographics and staff size) was correlated with minority employment percentage of parity illustrates that EEO achievements and failures occur irrespective of demographics and station size.

15. The fact that staff size was correlated with the number of referral sources, but not with the number of productive referral sources, indicates that many large stations apparently use their resources to propound long lists of local organizations which may or may not be cultivated as genuine sources of minority or female referrals.

16. The correlation between participation in job fairs and minority applicant pool percentage of parity suggests that stations participating in job fairs are succeeding in building applicant pools in which minorities are better represented. This finding lends support to the FCC's contention that the use of job fairs may be a useful alternative means to ensure that minorities are more proportionally represented in applicant pools.

**C. FCC EEO Forfeitures, 1990 - 1996**

MMTC's study, "FCC EEO Forfeitures, 1990 - 1996" is Exhibit 2 of these Comments. It is the first systematic review of how the FCC issues EEO forfeitures. MMTC undertook the study to determine how high the forfeitures have been, which types of stations typically receive forfeitures, and whether the election to impose a

short term renewal is correlated with the amount of a forfeiture.

The research questions answered by the study were:

1. How much does the FCC fine broadcasters for EEO violations? What is the variation in forfeiture amounts?
2. Do AM, FM, AM-FM or TV stations more commonly receive forfeitures and short term renewals?
3. Do large or small market stations more commonly receive forfeitures and short term renewals?
4. Is there a relationship between the level of a forfeiture and the issuance of a short term renewal?

MMTC reviewed the 115 EEO forfeitures issued by the FCC in connection with license renewal applications filed in the radio renewal cycle running from 1988 to 1991 and in the television renewal cycle running from 1991 to 1994.<sup>62/</sup> The decisions were issued between March, 1990 and May, 1996. The six variables studied measured station type (AM, FM, AM-FM or TV), market size, the size of a forfeiture, and whether the station also received a short term renewal.

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<sup>62/</sup> The decisions in question were issued through May, 1996; a handful of renewal applications filed during those renewal cycles are still pending. Some of the forfeitures MMTC analyzed were issued pursuant to Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules, 9 FCC Rcd 929 (1994) ("EEO Forfeitures") vacated on other grounds in the NPRM, 11 FCC Rcd at 5154; these forfeiture amounts and policies are similar to the new rules proposed in the NPRM.

Subsequently, many of the forfeitures issued pursuant to EEO Forfeitures were reduced to conform with the ad hoc forfeiture levels which obtained before EEO Forfeitures was issued. The supplemental decisions reducing some of the forfeitures were not included in MMTC's analysis.

MMTC's source for station types and forfeiture amounts was the FCC EEO Branch's forfeiture database. MMTC's source for market size data was the 1990 Census.

The standard measures of central tendency (mean, median, mode) and variability (standard error, standard deviation, skewness and kurtosis) were computed for each variable, and a correlation coefficient (r) was measured for each pair of variables.

This study's principal conclusions were as follows:

1. The median and mode for forfeitures were each \$15,000, and the mean forfeiture was \$15,029. Thus, the forfeitures were distributed almost precisely on a bell-shaped curve. The forfeiture amounts ranged from \$2,000 (four stations) to \$37,500 (one station). Five stations received forfeitures in excess of \$30,000 and five stations received forfeitures less than \$3,000. The standard deviation was \$8,029, meaning that approximately 68% of the forfeiture amounts would normally fall between \$6,993 and \$23,063. Forty-three (37%) of the 115 stations receiving forfeitures also received short term renewals. The study concluded that the almost perfect bell shaped distribution of forfeiture amounts discloses a remarkable even-handedness and consistency in the FCC's forfeiture decisions. Apparently, the FCC considers \$15,000 as a normative forfeiture amount. It then applies upward adjustment criteria almost exactly as frequently as it applies downward adjustment criteria in calculating forfeiture levels.

2. The amount of a forfeiture, and the choice to apply a short term renewal, were each uncorrelated with whether a station was an AM standalone, an FM standalone, an AM-FM combination, or TV station. The amount of a forfeiture, and the choice to apply a short term renewal, were also each uncorrelated with market size. The FCC appears neither to favor nor disfavor one type of station (AM, FM, AM-FM or TV) over another in its allocation of forfeiture amounts and in its decisions on whether to issue short term

renewals. Nor is the FCC favoring or disfavoring small or large market stations in rendering these decisions.

3. The mean forfeiture for the 43 stations issued short term renewals was \$20,543, and the mean forfeiture for the 72 stations not issued short term renewals was \$11,847. No station issued a forfeiture less than \$5,000 received a short term renewal. However, no statistically significant correlation was found between the decision to issue a short term renewal and the amount of a forfeiture. It appears that the FCC's decision to issue a short term renewal is guided by factors different from those which motivate it to select a forfeiture amount.

Because the FCC's range of forfeitures is modest, bell shaped and almost entirely bereft of skew either upward or downward from the mean, and the FCC's application of upward and downward adjustments appears to be evenhanded and well within its administrative discretion, the study concluded that public debate on the question of forfeiture amounts should focus largely on the appropriateness of the normative forfeiture amount relative to the normative forfeitures for non-EEO violations, rather than on the FCC's discretionary and apparently unassailably even-handed administration of its forfeiture policies.

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**III. The Need For Equal Opportunity Is Even More Critical Now Than It Was In 1976**

- A. Broadcasting and the marketplace may have changed since 1976, but the need for equal opportunity has been unaffected by these changes**

If the American journey of the last two centuries has taught us anything at all, it is that throughout our history as a nation, those in power have never provided equal opportunity to minorities and women unless the federal government required it and enforced it, or provided financial incentives to promote it. As Frederick Douglass declared one hundred and twenty years ago, "Power concedes nothing without a demand. It never has, and it never will."

The Second Circuit appreciated this obvious but unfortunate fact. Nineteen years ago, that Court soundly reversed an FCC attempt -- identical in relevant respects to the NPRM -- to adopt EEO enforcement cutbacks sugarcoated as "reforms." The Court declared that "[t]he Commission does not argue, nor could it, that the need for equal employment opportunity has become less urgent in the intervening years [since it adopted the EEO rule]." Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 533 (2d Cir. 1977) ("UCC III").<sup>63/</sup>

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<sup>63/</sup> Two years after UCC III, Judge Spottswood Robinson, in his dissent in part in Bilingual I, 595 F.2d at 639, explained:

the Commission is not free lightly to abandon its attentiveness to licensee prejudice in employment activity. It may exercise discretion in considering relevant factors, of course, but it cannot ignore any material contention fairly raised on that score.

History is repeating itself. Faced with right-wing threats to equal opportunity, today's Commission openly implores broadcasters to provide it with "data that would support" its proposals to cut back on EEO enforcement, "such as changes in broadcasting or the marketplace since the original rules were adopted." NPRM, 11 FCC Rcd at 5168 ¶30. The Commission further asks commenters "whether these proposals are distinguishable from the policy set aside by the court" in UCC III. NPRM, 11 FCC Rcd at 5168 ¶29.

The passage of a generation has failed to change the hearts of broadcasters sufficiently to justify that famous oxymoron, "self-regulation," in civil rights. In EEO, as in other areas of social regulation, the years have done little to moderate the avaricious side of human nature.<sup>64/</sup>

Twenty years is not a long time in civil rights history. Witness how much regression occurred in the twenty year period between 1876 and 1896, which bracketed the end of the First Reconstruction. Witness, further, how little positive change occurred between 1896 and 1916, or even between 1896 and 1946. Full freedom has been a work in progress for twenty generations.

It is seductive to be lulled into complacency by the success of minorities and women in on-air television news positions, as movie actors and as athletes. However, as psychologists Audrey Edwards and Craig Polite have observed, "America has become

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<sup>64/</sup> Public TV channel reservations have moderated some public broadcasters' temptation to sell their stations to the highest bidder. Deletion of Noncommercial Reservation of Channel \*16, 482-488 MHz, Pittsburgh, Pa., 1 CR 1141 (released August 1, 1996). Similarly, the new children's television regulations will moderate some commercial broadcasters' temptation to offer little of educational value to the next generation of citizens.

comfortable and literally color-blind in its acceptance and adoration of the blacks who entertain, but it is still stubbornly racist in conceding equitable power to blacks in most other areas....The power to entertain is not quite the same as the power to control.\*<sup>65/</sup>

Anecdotal evidence of the good deeds of some broadcasters cannot hide the fact that the era of equal opportunity is not yet close to arriving. That is the central fact which the Commission missed, but the Second Circuit recognized, nineteen years ago. Nondiscrimination in the Employment Practices of Broadcast Licensees, 60 FCC2d 226 (1976) (Commissioner Hooks dissenting) ("Nondiscrimination - 1976"), reversed in UCC III.

The Commission certainly must reassess previous regulatory policies, and the assumptions underlying them, in light of subsequent events and fundamentally changed circumstances. Bechtel v. FCC, 957 F.2d 873, 881 (D.C. Cir. 1992) ("Bechtel I") and Bechtel v. FCC, 10 F.3d 875, 878 (D.C. Cir. 1993) ("Bechtel II"). But it is also true that changes in policy "must be rationally and explicitly justified in order to assure 'that the standard is being changed and not ignored, and...that [the agency] is faithful and not indifferent to the rule of law.'" UCC III, 560 F.2d at 532, citing Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (D.C. Circuit 1971).

That is why the Commission must carefully examine all of the changes in broadcasting and the broadcast marketplace which have

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<sup>65/</sup> Audrey Edwards and Dr. Craig K. Polite, Children of the Dream: The Psychology of Black Success (1992), quoted in Anita Doreen Diggs, Talking Drums (1995), p. 114.

occurred since 1976. At least fourteen such materially changed circumstances are relevant here:

1. Broadcasters and the communications bar have had twenty years of experience with EEO compliance requirements.
2. Broadcast administrative offices are largely "paperless."
3. Job opportunities in broadcasting are becoming more scarce.
4. As a result of the Telecommunications Act, the number of independent voices in local markets is declining rapidly.
5. Stations are changing hands much more frequently now than they were twenty years ago.
6. The renewal term is now eight years rather than three.
7. Broadcasters no longer need to face competing applications at renewal time.
8. The diseases of bigotry and intolerance have spread at an alarming rate, becoming the national symbols of the radio industry.
9. Discriminators have become much more sophisticated in concealing their actions.
10. The EEOC's enforcement abilities are a shadow of what they were twenty years ago.
11. National civil rights organizations possess relatively far fewer resources than they did twenty years ago.
12. Minority owners are being forced out of the industry at warp speed.
13. Under deregulation, stations are no longer required to serve minority audiences.
14. Every diversity promoting FCC regulatory initiative except EEO is gone.

The first two of these factors eliminate excuses for EEO noncompliance. The remaining twelve factors each enhance the need for aggressive FCC EEO enforcement. We examine each factor in turn.

1. **Broadcasters and the communications bar have had twenty-five years of experience with EEO requirements**

Broadcasters have had twenty-five years of "familiarity with our long-standing EEO Rule." Sage Broadcasting Corp., 10 FCC Rcd 4429, 4432 ¶20 (1995) ("Sage"). Broadcasters cannot be heard now, as they were heard in 1976, to argue that the EEO Rule is arcane or requires a learning curve.

2. **Broadcast administrative offices are largely "paperless"**

Advances in technology have done much to reduce the already extremely modest cost and time expenditures required for EEO compliance.

Using 1976 technology, sending job notices to five sources whenever a job was open required affixing stamps, postage, and photocopied mailing labels to five envelopes -- a task consuming perhaps \$5.00 in personnel time and consumable supplies.

Using 1996 technology, sending job notices to fifty sources whenever a job is open requires ten seconds of work -- an e-mail posting or fax polling, and it costs virtually nothing.

Using 1976 technology, retaining job applications meant putting them into a hanging folder in a file cabinet. Such files, retained for eight years, might have occupied a cubic half-foot of space at most, and required a couple of hours of secretarial time every renewal period for retrieval and cataloguing.

Using 1996 technology, the job applications can be scanned, catalogued by applicant and job characteristics, and stored on hard disk in less than the time it once take took to copy and file them in a drawer. Once on hard disk, they take up no physical space and are impervious to destruction and loss. The time required for

retrieval and cataloguing is virtually zero.

"Paperless office" software is available off the shelf at any computer supply store. It is already in common use by the sales departments of most broadcast stations. Its widespread availability further illustrates that "changes in broadcasting" render it less and less credible for broadcasters to continue to trot out the 50-year old argument that civil rights compliance is but an onerous "burden."<sup>66/</sup> See pp. 101-116 infra.

3. Job opportunities are becoming more scarce

People are becoming expendable in the broadcasting industry for two reasons.

First, like many industries reliant on technology, many jobs are being rendered superfluous by computerization and the use of satellites. This development has affected programming jobs the most, reducing substantially the number of positions for tape editors, producers, and announcers.

Second, the Telecommunications Act,<sup>67/</sup> and the Commission's rules implementing the Act,<sup>68/</sup> is likely to bring about

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<sup>66/</sup> These Comments propose that the Commission develop standardized EEO compliance software which would automatically merge a station's personnel files into FCC Form 395 and FCC Form 396 and create a database suitable for ongoing EEO self-assessment. See p. 346 infra. The universal adoption of this software would do much to reduce costs, avoid errors, and introduce consistency to the EEO compliance process -- for broadcasters, the public, and the Commission's EEO staff.

<sup>67/</sup> 47 U.S.C. §§202(a), 202(b)(1) (1996) (multiple ownership).

<sup>68/</sup> Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership) (Order), 2 CR 376, FCC 96-90 (released March 8, 1996) at 2 (revising local ownership rules, so that in a radio market with 45 or more commercial radio stations, a party may own, operate or control up to eight commercial radio stations, not more than five of which are in the same service (AM or FM). Somewhat smaller caps apply for smaller markets.)

unprecedented consolidation in the radio industry.<sup>69/</sup> Attendant to this ownership concentration is likely to be substantial job

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<sup>69/</sup> Local ownership concentration is so intense that in twenty markets, one company already controls over 40% of the 12+ audience shares, and in four markets, one company controls over 50% of these shares. Radio Business Report, June 3, 1996, p. 6, and June 17, 1996, p. 12.

Measured in numbers of voices, the pace of concentration is increasing at an astounding pace. In April, according to Radio Business Report, superduopolies and LMA's already comprised 44% of Arbitron-rated stations, with nearly 10% in superduopolies. ("Duopoly" means two or more same-service stations (e.g., AM-FM-FM); "superduopoly" means three or more same-service stations (e.g., AM-AM-AM-AM-FM-FM-FM-FM)). In the top 50 markets, 50% of all commercial stations were involved in a duopoly or a superduopoly, and there was at least one duopoly or superduopoly in every top 50 market. For smaller markets, the percentages of stations in duopolies or superduopolies were 49.3% for markets 51-100, 41.0% for markets 101-150, 40.1% for markets 151-200, and 33.0% for markets 201-261. In some markets, the percentage of stations in duopolies or superduopolies exceeded 60% -- e.g., Seattle (74.4%), Orlando (72.0%), Wichita (72.7%), Lansing (80%), Detroit (62.5%), Dallas (60.5%), Charlotte (66.7%), and Miami (60.5%). Tony Sanders and David Seyler, "Superduopoly now in 10% of rated markets; 44% of rated stations in duops/superduops or LMAs," Radio Business Report, April 8, 1996, p. 8.

Just three months later, in July, 1996, Radio Business Report updated this data to report that 52% of rated stations were in LMAs, duopolies and superduopolies, with nearly 20% in superduopolies. Radio Business Report, July 1, 1996, p. 10. Thus, the percentage of stations in superduopolies doubled in just three months! -- and it's not over yet: radio broker Steven Pruett predicts that we can expect "major consolidation [to continue] for the next three to five years almost unabated." Elizabeth Rathbun, "\$8 billion bull loose in station market," Broadcasting and Cable, March 11, 1996, pp. 40, 43 ("Rathbun").

The Denver market provides an example of the dramatic growth of local concentration. In Spring, 1992, there were 16 owners of 25 rated stations in the Denver market, with none having more than two stations. The highest 12+ audience share was 12.4. There were seven stand-alones, including two standalone AMs. The seven standalones had a cumulative 12+ audience share of 17.2. By the fall of 1995, there were 29 rated stations in the market, with one company owning eight, another five, another four and another three. The highest 12+ audience share was 30.8 (for the eight station combination). There were only three stand-alones remaining, one of them an AM. The three standalones had a cumulative 12+ audience share of 10.0. Id. at 12.

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consolidation, especially in programming, promotion and sales.

Indeed, it is the ability to "achieve cost-savings" which drives local ownership concentration. "Cost savings" are often industry code for firing people -- combining two stations' traffic director positions into one, buying one's format competitor so as to enable one or both stations to fire their promotion directors, and closing down one station's news and public affairs department because these functions are already performed at another station.

Consolidation will often have the effect of shifting positions from local stations to broadcast headquarters operations, where an individual can perform functions for several stations

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69/ [continued from p. 62]

The Orlando market provides another example. In Spring, 1992, there were 14 owners of 21 rated stations in the Orlando market, with none having more than two stations. The highest 12+ audience share was 17.6. There were nine stand-alones, all FMs. The nine standalones had a cumulative 12+ audience share of 38.5. By the fall of 1995, there were 26 rated stations in the market, with one company owning seven, another six, another four and another three; the highest 12+ audience share was 30.0 (for the seven station combination). Every station with a 12+ audience share over 3.2 was in a superduopoly. There was only one stand-alone remaining, with a 12+ audience share of 3.2. Id. at 14.

The impact of this concentration on local markets is uncertain and fraught with danger. Harry Cole has pointed out that in many medium sized markets which are counted as part of a larger market for multiple ownership purposes (e.g., Trenton, NJ), one company could wind up owning every station because the larger market's signals (e.g., those in Philadelphia) are counted as "local" voices. Harry Cole, "Redefining Radio 'Markets'", Radio World, August 7, 1996, p. 16. If (as is likely) a broadcaster finds it more financially attractive to operate each of his stations in Philadelphia than to detail one of them to Trenton as a source of local news and information, then this capital of one of our largest states could find itself without any radio stations at all.

The result of local media concentration is unsurprising: the media is becoming more homogenized and less provocative, and thus more amenable of the right-wing ideologues or bigots who seem to dominate our public discourse.